Exhibit Dynamics, Inc. *and* Ohio and Vicinity Regional Council of Carpenters. Case 8–CA–34859–1

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint and compliance specification. Upon a charge and an amended charge filed by the Ohio and Vicinity Regional Council of Carpenters and Joiners of America (the Regional Council) on February 24, and April 7, 2004, respectively, the General Counsel issued the consolidated complaint and compliance specification on April 27, 2004, against Exhibit Dynamics, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On August 30, 2004, the General Counsel filed a Motion for Default Judgment with the Board. On September 1, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the consolidated complaint and compliance specification affirmatively stated that unless an answer was filed by May 18, 2004, all the allegations in the consolidated complaint and compliance specification could be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated July 7, 2004, notified the Respondent that although on May 21, 2004, the Region granted the Respondent's request for an extension of time to file an answer until June 15, 2004, no answer had been received. The Region further advised that unless an answer was received by July 15, 2004, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Texas corporation with a facility located at 12930 Darice Parkway, Strongsville, Ohio, has been engaged in the business of manufacturing signs and displays. During the 12-month period preceding the issuance of the consolidated complaint and compliance specification, the Respondent, in conducting its business operations described above, sold and shipped from its Strongsville, Ohio facility goods valued in excess of $50,000 directly to points located outside the state of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Regional Council, and Millmen's Local 1242, affiliated with the Regional Council (Local 1242), have been labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times the following individuals held the positions set forth opposite their names and have been supervisors within the meaning of Section 2(11) of the Act and/or agents of the Respondent within the meaning of Section 2(13) of the Act:

Sam Lugo	Chief Financial Officer
John Mark Chevallier	Attorney

The following employees of the Respondent at its Strongsville, Ohio facility constitute a unit appropriate

[1] The complaint states that the Respondent, on or about February 3, 2004, notified Local 1242 that it intended to file a bankruptcy petition. The General Counsel's motion and the consolidated complaint and compliance specification do not indicate whether the Respondent actually filed a bankruptcy petition. However, even assuming that the Respondent has, it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited there; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees in or about the shop with the exception of Photographers, office, all field supervisors and professional employees.

Since at least March 1, 2001, and at all material times, Local 1242 has been the designated exclusive collective-bargaining representative of the unit described above, and since at least then Local 1242 has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from March 1, 2001, to February 28, 2004.

At all times since at least March 1, 2001, based on Section 9(a) of the Act, Local 1242 has been the exclusive collective-bargaining representative of the unit.

About February 3, 2004, the Respondent notified Local 1242 that it intended to cease its operations at its Strongsville, Ohio facility and file a bankruptcy petition.

Since February 4, 2004, and at various times thereafter, Local 1242 and the Regional Council have requested that the Respondent bargain collectively about the effects of its decision to cease operations referred to above.

Since about February 4, 2004, the Respondent has failed and refused to bargain collectively about the effects of its decision to cease operations at the Strongsville, Ohio facility.

About March 12, 2004, the Respondent ceased its manufacturing operation at its Strongsville, Ohio facility.

The subjects set forth above relate to the wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

Since about March 10, 2004, the Respondent unilaterally modified the terms of article 11-1.4 (vacations) of its collective-bargaining agreement with Local 1242, by ceasing to provide employees with their accrued vacation pay when employment is terminated. The Respondent engaged in the conduct described above without prior notice to Local 1242 and without having received the agreement of Local 1242.

The terms and conditions of employment set forth above are mandatory subjects for the purpose of collective bargaining.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the Respondent's unlawful failure and refusal to notify and bargain with Local 1242 about the effects of the Respondent's decision to cease operations at its Strongsville, Ohio facility, we shall order the Respondent to bargain with Local 1242, on request, about the effects of that decision. As a result of the Respondent's unlawful failure to bargain in good faith with Local 1242 over the effects of its decision to cease its operations, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to Local 1242. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the purposes of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[2]

Thus, the Respondent shall pay the unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 business days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with Local 1242 on those subjects pertaining to the effects of its decision to cease operations at its Strongsville facility on its employees; (2) a bona fide impasse in bargaining; (3) Local 1242's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with Local 1242; or (4) Local 1242's subsequent failure to bargain in good faith.

[2] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased doing business at the facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Here, the General Counsel, in the compliance specification, seeks the minimum 2 weeks of backpay due the terminated unit employees under *Transmarine*. We shall grant the General Counsel's request and order the Respondent to pay the amounts set forth in the compliance specification, with interest as prescribed in *New Horizons for the Retarded*, supra. However, in view of the General Counsel's assertion that the backpay period is not tolled, the backpay period shall continue until the occurrence of the earliest of the conditions set forth in *Transmarine*.

In addition, having found that the Respondent unlawfully ceased to pay vacation pay to bargaining unit employees, the Respondent is ordered to restore the status quo that existed just prior to its unlawful change, and to make the unit employees whole for any losses they may have suffered as a result of the Respondent's unlawful failure to pay them vacation pay, by paying to them the amounts set forth in the compliance specification, with interest as prescribed in *New Horizons for the Retarded*, supra.

In view of the fact that the Respondent's facility is apparently closed, we shall order the Respondent to mail a copy of the attached notice to Local 1242 and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Exhibit Dynamics, Inc., Strongsville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Millmen's Local 1242, affiliated with the Ohio and Vicinity Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, concerning the effects on the unit employees of its decision to cease operations at its Strongsville, Ohio facility. The bargaining unit consists of:

> All employees in or about the shop with the exception of Photographers, office, all field supervisors and professional employees.

(b) Failing and refusing to bargain with Local 1242 by unilaterally ceasing to pay vacation pay to its unit employees without first notifying Local 1242 and affording it an opportunity to bargain about this change and the effects of this change.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local 1242 over the effects on unit employees of its decision to cease operations at its Strongsville, Ohio facility, and put in writing and sign any agreement reached as a result of such bargaining.

(b) Pay the individuals named below the amounts following their names, plus interest accrued to the date of payment as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and minus tax withholdings required by Federal and State laws:

Employee Name	Vacation	Wages	Total
Todd Arnold	$ 872.32	$ 1,090.40	$ 1,962.72
Richard Beller	2,476.80	1,651.20	4,128.00
Robert Bochin	152.80	1,526.40	1,679.20
David Chislow	2,283.68	1,631.20	3,914.88
Roger Churgovich	1,795.20	1,632.00	3,427.20
John Dancy	1,113.28	1,590.40	2,703.68
Jeremiah Edgar	985.68	1,095.20	2,080.88
Pascal Ginesta	2,088.00	1,740.00	3,828.00
Christopher Hardin	1,588.00	2,064.40	3,652.40
Richard Knapik	2,596.80	1,731.20	4,328.00
Warren Norton	1,833.92	1,667.20	3,501.12
Michael Petersen	1,914.00	1,740.00	3,654.00
Gregory Sommer	2,311.68	1,651.20	3,962.88
Clay Sublett	2,142.00	1,428.00	3,570.00
William Vigh	1,944.00	1,620.00	3,564.00
Bradley Zumack	2,250.56	1,731.20	3,981.76
TOTAL			$53,938.72[3]

(c) Pay to the unit employees their normal wages for the period set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

[3] We correct the following mathematical errors in the compliance specification: the total amount due Robert Bochin is $1,679.20 rather than $1,526.40, and the total amount due all unit employees is $53,938.72 rather than $53,938.36.

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense, and after being signed by the Respondent's authorized representative, signed and dated copies of the attached notice marked "Appendix"[4] to Local 1242 and to all unit employees employed at the Strongsville, Ohio facility on or after February 4, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mailed and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Millmen's Local 1242, affiliated with the Ohio and Vicinity Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, concerning the effects on the unit employees of our decision to cease operations at our Strongsville, Ohio facility. The bargaining unit consists of:

> All employees in or about the shop with the exception of Photographers, office, all field supervisors and professional employees.

WE WILL NOT fail and refuse to bargain with Local 1242 by unilaterally ceasing to pay vacation pay to our unit employees without first notifying Local 1242 and affording it an opportunity to bargain about this change and the effects of this change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Local 1242 over the effects on unit employees of our decision to cease operations at our Strongsville, Ohio facility, and put in writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the individuals named below the amounts following their names, plus interest accrued to the date of payment, and minus tax withholdings required by Federal and State laws:

Employee Name	Vacation	Wages	Total
Todd Arnold	$ 872.32	$ 1,090.40	$ 1,962.72
Richard Beller	2,476.80	1,651.20	4,128.00
Robert Bochin	152.80	1,526.40	1,679.20
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William Vigh	1,944.00	1,620.00	3,564.00
Bradley Zumack	2,250.56	1,731.20	3,981.76
TOTAL			$53,938.72

WE WILL pay our unit employees further limited backpay in connection with our failure to bargain over the effects of our decision to cease operations at our Strongsville, Ohio facility, as required by the Decision and Order of the National Labor Relations Board.

EXHIBIT DYNAMICS, INC.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."